PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 663

WILLIAM Y. FONG, as Guardian ad Litem for Fong Wone Jing, Fong Hung Wing and Fong Ngar Jing,
Petitioners,

vs.

JOHN FOSTER DULLES, as Secretary of State,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR A WRIT OF CERTIORARI.

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No.

WILLIAM Y. FONG, as Guardian ad Litem for Fong Wone Jing, Fong Hung Wing and Fong Ngar Jing,
Petitioners,

vs.

JOHN FOSTER DULLES, as Secretary of State,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable Earl C. Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioners, Fong Wone Jing, Fong Hung Wing and Fong Ngar Jing, by their guardian ad litem, William Y. Fong, pray that a writ of certiorari issue

to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming a judgment entered therein for respondent and dismissing petitioners' claim to American citizenship.

OPINIONS BELOW.

The order of the District Court (based upon the District Court's opinion in *Ly Shew v. Acheson,* decided the same date) is not reported but it is printed at page 11 in the record. The opinion of the Court of Appeals for the Ninth Circuit has not yet been officially reported, but it is printed in Appendix A hereto, infra, pp. 1-4. An earlier opinion of the Court of Appeals, dated August 18, 1954, is also printed in Appendix B hereto, infra, pp. 5-8.

The opinion of the District Court in *Ly Shew v. Acheson* is reported at 110 F. Supp. 550. (Appendix C, infra, pp. 9-30.) Subsequent opinions of the Court of Appeals for the Ninth Circuit in *Ly Shew v. Acheson* have not yet been officially reported, but are set forth in Appendix D, pp. 31-41, and Appendix E, pp. 42-56, infra.

JURISDICTION.

The judgment of the Court of Appeals was filed and entered on November 23, 1954. (R. 123.) A timely petition for rehearing was denied on January 25, 1955. (R. 124.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. In an action against an administrative official for a declaration of United States nationa ity, is any factual issue raised as to defendant's own prior rejection of the claim by defendant's answer merely denying such rejection on "no knowledge, information or belief"?

2. Is any factual issue presented, regarding defendant's rejection of a claim of United States nationality, where defendant's answer affirmatively alleges that plaintiffs "do not have any right or privilege as nationals of the United States" and "that plaintiffs are, in fact, aliens and citizens of China"?

3. Is prior administrative rejection of a United States nationality claim in issue, where counsel for defendant in his opening statement refers to such rejection, admits that plaintiffs were permitted to proceed to the United States on Certificates of Identity solely to litigate the disputed claims, and did not urge this issue at any time during trial?

STATUTES INVOLVED.

The Act of February 10, 1855, Section 1993, Revised Statutes of the United States (2 Stat. 153), in force until May 24, 1934, which reads as follows:

> "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of

citizenship shall not descend to children whose fathers never resided in the United States."

The pertinent provisions of the Act of May 24, 1934 (48 Stat. 797; 8 U.S.C. 6), which amended the provisions of Section 1993, supra, provides in part:

"Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the right of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization."[1]

Section 503 of the Nationality Act of 1940 (54 Stat. 1171; 8 U.S.C. 903) provides, in part, as follows:

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[1]The requirement that such children must reside in the United States for at least five years immediately previous to attaining the age of 18 years was retrospectively changed by the 1940 Act to provide that such residence must be between the ages of thirteen and twenty-one years (U.S.C. 601(g)(h)), and was again retrospectively changed by the 1952 Act to require that the child must come to the United States before attaining the age of twenty-three years and must be continuously physically present in the United States for five years between the ages of fourteen and twenty-eight years (8 U.S.C. 1401(b)(c)).

"If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a sunbstantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States * * *."[2]

The pertinent parts of Rule 8 of the Federal Rules of Civil Procedure, 28 U.S.C.A., which read as follows:

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[2]This statute has been repealed by the Immigration and Nationality Act of 1952 (8 U.S.C. sec. 1101, et seq.) which became effective December 24, 1952, but Section 405(a) of the latter Act continues the former statute in force and effect as to suits which were pending when the new Act became effective. (66 Stat. 280.)

"(b) **Defenses; Form of Denials.** A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. * * *"

"(d) **Effect of Failure to Deny.** Averments in a pleading to which a responsive pleading is required, * * *, are admitted when not denied in the responsive pleading. * * *"

STATEMENT.

This action is for a declaratory judgment to establish petitioners' United States nationality, pursuant to 8 U.S.C. 903. Petitioners claim to be citizens of the United States on the ground that their father, Fong Lim Fong, was a citizen of the United States at the time of their respective births in China. The claim of the oldest petitioner arises under Section 1993 of the Revised Statutes, as originally enacted, and the claims of the two younger petitioners arise under the same section as amended by the Act of May 24, 1934. (48 Stat. 797.)

Following denial by the American Consulate General at Hong Kong of petitioners' application to that Consulate for travel documents to permit them to proceed to the United States, this action was filed in

the United States District Court for the Northern District of California. (R. 3.) Petitioners were then permitted to come forward to the United States on Certificates of Identity issued by the American Consulate General at Hong Kong as provided in Section 503 of the Nationality Act of 1940 (54 Stat. 1171; 8 U.S.C. 903), for the sole purpose of prosecuting this suit. (R. 21.)

The complaint alleged:

"That * * * (petitioners) are the true and lawful blood children of Fong Lim Fong who was a citizen of the United States; * * * that (petitioners) * * * are the issues of the aforesaid marriage of Fong Lim Fong and Jee Shee; and that the aforesaid marriage and the birth of said (petitioners) were duly reported to the Immigration and Naturalization Service * * *;

"That on or about January 24, 1951, an application was filed with the American Consulate General at Hong Kong for the issuance of a United States passport or travel document in behalf of * * * Fong Hung Wing; that on or about May 10, 1951, an application was filed with the American Consulate General at Hong Kong for the issuance of a United States passport or travel document in behalf of * * * Fong Wone Jing and Fong Ngar Jing; that the applicants and each of them were informed by the American Consulate General at Hong Kong on or about January 24, 1952, that their applications for documentation had been denied, and that 'the Consulate General declines to afford you facilities for the execution of an affidavit for the purpose of traveling to the United States;'" * * * that the re-

fusal of the American Consulate General at Hong Kong to permit (petitioners) to proceed to a port of entry in the United States for the purpose of having their admissibility determined by the administrative agency charged with such duty is an arbitrary and unreasonable refusal or denial of a right or privilege of a United States national; * * * that (petitioners) applications for documentation as United States citizens were denied by the American Consulate General at Hong Kong * * * on or about January 24, 1952; that the Department of State through its official executive at Hong Kong did, on or about January 24, 1952, deny (petitioners), and each of them, a right or privilege as nationals of the United States * * *."

The answer alleged:

"Denies that * * * (petitioners) are the true and lawful blood children of Fong Lim Fong;" * * * affirmatively asserts "that (petitioners) do not have any right or privilege as nationals of the United States;" * * * denies "that (petitioners) have any claim to United States citizenship or nationality;" and affirmatively alleges "that (petitioners) are, in fact, aliens and citizens of China."

The answer further denied Paragraph VI of the complaint relating to the application and processing by the American Consulate at Hong Kong on the ground that (respondent):

"has no knowledge, information or belief as to the allegations contained in Paragraph VI of the Complaint and therefore denies the same."

After trial the District Court ordered judgment for defendant because the "evidence presented by plaintiffs does not conform to the standards fixed by *Ly Shew v. Acheson,* #30159 and #31161, this day decided" (R. 11). The decision of the District Court in Ly Shew v. Acheson, is fully set forth in Appendix C, infra, pp. 9-30, hereto. Subsequent decisions of the Court of Appeals for the Ninth Circuit in the Ly Shew case are also set forth in Appendix D, infra, pp. 31-41, and Appendix E, infra, pp. 42-56.

On August 18, 1954, the Court of Appeals for the Ninth Circuit filed an opinion affirming the judgment below (Appendix B, infra, pp. 5-8). On November 23, 1954, a new opinion was substituted for the opinion filed on August 18, 1954. (R. 119.) In the opinion of November 23, 1954 the Court of Appeals affirmed on the ground that petitioners had failed to prove that they had been denied any right or privilege by a Department or agency on the ground that they were not nationals of the United States. Appendix A, infra, pp. 1-4.

REASONS FOR GRANTING CERTIORARI.

This writ of certiorari is sought because the issues presented herein raise important and substantial problems under the Federal Rules of Civil Procedure, represent an attempted stultification of a statutory remedy, and threaten grave miscarriage of justice to more than 700 similar cases waiting trial in District

Courts throughout the United States. Additionally, the decision below is in conflict with decisions of this Court and contrary to decisions of other Circuits. While the decision below is ostensibly based upon a purported lack of proof that respondent had rejected petitioners' nationality claim, actually such rejection had been directed by respondent and had been admitted for the purposes of the trial.

1. The decision of the Court below holds that an administrative official's answer denying "knowledge, information or belief"[3] regarding his own administrative action is a responsive pleading.

Rule 8(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., requires that "Denials shall fairly meet the substance of the averments denied." Subsection (d) of the Rule provides that "Averments in a pleading to which a responsive pleading is required * * * are admitted when not denied in the responsive pleading." This Rule also provides, subsection (b) thereof, that if a party "is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial."

Where the fact is one within the defendant's own knowledge or is accessible to him by consulting his records, a sham denial of "no knowledge, information

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[3]There is considerable doubt concerning the sufficiency of such a pleading as a denial since it is not couched in the form prescribed by Rule 8(b) of the Federal Rules of Civil Procedure. *Mahawor v. U. S.*, 192 F2d 873, 876 (C.A. 1, 1951); *Nieman v. Bethlehem National Bank*, 32 F. Supp. 436, affirmed 113 F2d 717 (C.A. 3, 1940.

or belief" is not filed in good faith, is palpably untrue, is frivolous and insufficient to raise any genuine issue of fact.

Oregon Mesabi Corp. v. C. D. Johnson Lumber Corp., 166 F2d 997, 1001, (C.A. 9, 1947), cert. den. 334 U.S. 837;

Kalo Inoculant Co. v. Funk Bros. Seed Co., 161 F2d 981, 989, (C.A. 7, 1947); reversed other grounds 333 U.S. 127;

U.S. v. Metzger, 133 F2d, 82, 83 (C.A. 9, 1943); cert. den. 320 U.S. 741;

Nieman v. Bethlehem National Bank, 32 F. Supp. 436, affirmed 113 F2d 717 (C.A. 3, 1940);

Lloyd Sabaudo Societa Anonime Per Azioni v. Elting, 46 F2d 315 (D.C., S.D., N.Y., 1935).

In the *Lloyd Sabaudo* case, supra, the defendant Collector of Customs denied knowledge or information sufficient to form a belief as to certain official action alleged to have been taken in the case by the immigration authorities. The Court said:

> "The defendant, having acted as an officer of the Government in the collection of the fines, was entitled to have access to the records which disclosed the facts upon which the fines were based, and as a matter of law must be presumed to have had knowledge of these facts." (Citing cases.)

The Court went on to quote from *Dahlstrom v. Gemunder,* 198 N.Y. 449, 92 N.E. 106, 19 Ann. Cas. 771, as follows:

> "A party may not thus deny possession of knowledge or information which presumably he has; neither may be purposely turn his head and close his eyes and ears for the purpose of avoiding knowledge and information, and of enabling him to make a denial thereof."

Acceptance of the decision below would emasculate the salutary provisions of Section 503 of the Nationality Act of 1940. (54 Stat. 1171; 8 U.S.C. 903.) Refusal to disclose or admit administrative rejection of a claim of United States nationality defeats the statutory remedy.

2. The decision below, filed November 23, 1954, is in direct conflict with decisions of this Court and decisions of other Circuit Courts holding that where defendant admits an allegation no evidence or finding is needed to established such fact.

It was stated by this Court in *Armstrong Paint & V. Works v. Nu-Enamel Corp.*, 305 U.S. 315, 322:

> "As the petitioner concedes by answer that * * * no evidence or finding is needed to establish that fact."

The Court below by its opinion (Appendix A, infra, pp. 1-4), concludes that petitioners did not prove that they had been denied a right or privilege by a Department or agency on the ground that they were not nationals of the United States, and that their affirmative allegations of the complaint were denied by the answer. This conclusion refuses to recognize that

the denial of "no information, knowledge or belief" was modified or disclaimed by other allegations in the answer.

> *Caterpillar Tractor Co. v. International Harvester Co.,* 106 F2d 769, 774 (C.A. 9, 1939).

The respondent in his answer denies that the petitioners "are the lawful blood children of Fong Lim Fong" (R. 8, II); affirmatively asserts that petitioners "do not have any right or privilege as nationals of the United States" (R. 9, VII); and denies that petitioners "have any claim to United States citizenship or nationality and affirmatively alleges that (petioners) are, in fact, aliens and citizens of China" (R. 10, X).

In *Moore v. U.S.,* 182 F2d 332, 336 (C.A. 5, 1950, reversed other grounds, 340 U.S. 616), the Court declared:

> "There was no burden on the plaintiff to prove facts which defendants by their pleadings had therefore fully admitted."

There are admissions in pleadings which are conclusively binding upon the party making them. *Stolte v. Larkin,* 110 F2d 226, 232, (C.A. 8, 1940). No averment of "no knowledge, information or belief" can negative affirmative admissions in the same answer. Compare *Jeffress v. New York Life Ins. Co.,* 74 F2d 874, 876 (C.A. 4, 1935).

In *Darling Shops of Tennessee v. Brack,* 95 F2d 135, 141, (C.A. 8, 1938), the Court said:

> "Admissions in the pleading upon which the trial was had and which was not amended or withdrawn must be deemed proven as judicial admissions and must be assumed against the pleader. (Citing cases.)"

The purpose of Rule 8(b) of the Federal Rules of Civil Procedure, requiring a party to either admit or deny averments of the complaint, was to frame the triable issues. Facts not denied are deemed admitted. *Rule 8(d); McComb v. Blue Auto Stores,* 164 F2d 329, 331 (C.A. 7, 1947); cert. den. 332 U.S. 855. The averments of an answer are competent evidence and admission of the facts stated. *Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter,* 32 F2d 195 (C.A. 2, 1929); cert. den. 280 U.S. 579. Compare: *Fruco Construction Co. v. McClelland,* 192 F2d 241, 245 (C.A. 8, 1951), cert. den. 342 U.S. 945.

Neither proof nor finding is requisite with respect to admitted or uncontested issues. *Freedom National Bank v. Northern Illinois Corp.,* 202 F2d 601, 606, (C.A. 7, 1953); *Douds v. Local* 1250, *Retail Wholesale Department Store Union,* 170 F2d 695, 699 (C.A. 2, 1948).

Subsequent to the decision in the instant case, the Court of Appeals for the Ninth Circuit, in *Ly Shew v. Dulles,* (Appendix E, infra, pp. 42-56) held:

> "The answers denied that Ly Shew was the father of Moon and Ning, thus, in effect, denying that Moon and Ning were citizens or nationals of the United States. On the issues thus

> raised, Moon and Ning had the burden of proof, which is to say, the burden of proving that Ly Shew was their father."

The factual situation, as well as the pleadings, in the case at bar is identical with respect to rejection of the United States nationality claims to those presented in *Ly Shew v. Dulles,* supra.

The decision of the Court below refuses to treat the answer as an entirety; refuses to recognize affirmative admissions, and requires proof of allegations not in issue.

3. The decision of the Court below requires petitioners to prove admissions of counsel for respondent in his opening statement. Such requirements are contrary to the Federal Rules of Civil Procedure and decisions of other Circuits.

In *Washington Loan & Trust Co. v. U. S.,* 134 F2d 59, 61, (C.A., D.C., 1943), it was held that:

> "It is conceded, of course, that on this appeal the facts stated by counsel are to be taken as undisputed."

To the same effect, *France Manufacturing Co. v. Jefferson Electric Co.,* 106 F2d 605, 610 (C.A. 6, 1939), cert. den. 309 U.S. 657, where the Court stated:

> "In the trial of a cause, any fact bearing upon the issue involved admitted by counsel may be the ground of the Court's procedure equally as if established by the clearest proof. Oscanyan v. Arms Company, 103 U.S. 261 * * *."

See also:

Best v. District of Columbia, 291 U.S. 411, 415 (1934);

Firfer v. U. S., 208 F2d 524, 526 (C.A., D.C., 1953);

Sahnley v. Bowers, 81 F2d 13, 16 (C.A. 2, 1936).

Counsel for respondent in his opening statement referred to the rejection by the American Consulate in Hong Kong of petitioners' application for documentation (R. 20); the issuance to petitioners of Certificates of Identity by the American Consulate General at Hong Kong (R. 19), and their subsequent admission to the United States under the provisions of 8 C.F.R. 112.2 (R. 21).

Department of State regulations pertaining to the issuance of Certificates of Identity for admission to the United States to prosecute an action under Section 503 of the Nationality Act of 1940, (8 U.S.C. 903) are set forth in 22 C.F.R., Sec. 50.18 to Sec. 50.29. Pertinent parts are set forth in Appendix F, infra, pp. 57-59.

Immigration regulations and other data pertaining thereto are also printed in Appendix F, infra, p. 58.

Neither in his opening statement, his evidence, nor his closing arguments did respondent in any way indicate he was attempting to rely upon the defense which is the basis of the Circuit Court's decision. This question was not urged until respondent filed his Pe-

tition for Rehearing after the opinion of the Court dated August 18, 1954.

This Court in *McCandless v. Furland,* 293 U.S. 67, 74 (rehearing denied 293 U.S. 632), stated:

> "The reason for the rule is the broad one that a defect lurking in the record on appeal may not be allowed to defeat recovery, where the defect might have been remedied, if the objection had been seasonably raised in the trial Court."

A similar view was expressed in *Louisville & N. R. Co. v. Botts,* 173 F2d 164, 168, (C.A. 8, 1949), where the Court declared:

> "Neither in its opening statement, its evidence, its motion for a directed verdict, nor in its argument to the jury did appellant in any way indicate that it was attempting to rely on such a defense."

See also:

O'Reilly v. Campbell, 116 U.S. 418, 420.

The decision of the Court of Appeals rests upon a premise never asserted in the trial Court. In effect, it denies petitioners procedural due process of law. The point was waived by failure to raise it by timely objection in the trial Court.

United States v. Ellison, 74 F2d 864, 869 (C.A. 4, 1935);

United States v. Kiles, 70 F2d 880, 881 (C.A. 8, 1934);

United States v. Edwards, 23 F2d 477, 480 (C.A. 8, 1927).

The Court below, contrary to these decisions, and diametrically opposite to the withdrawn opinion of August 18, 1954 (Appendix B, infra, pp. 5-7), on respondent's petition for rehearing made a determination decisive of vital rights on a factual question not raised in the trial Court.

4. The finding of the District Court that petitioners had not sustained the burden of proof was predicated upon the standards announced by the Court in *Ly Shew v. Acheson,* 110 F. Supp. 50, (Appendix C, infra, pp. 9-30). Those standards have since been rejected and all but the instant case reversed and remanded with instructions. *Ly Shew v. Dulles,* Appendix E, infra, pp. 42-56.

Also compare:

Mar Gong v. Brownell, 209 F2d 448 (C.A. 9, 1954);

Lee Wing Hong v. Dulles, 214 F2d 753 (C.A. 7, 1954).

CONCLUSIONS.

The liberty, freedom, and future lives of these petitioners, as well as others so situated, are seriously impaired by the decision of the lower Court. Upon a technical nicety, which was never urged by respondent in the trial Court, their right to a judicial determination of United States nationality as provided by Congressional enactment is to be denied.

The decision rests upon an issue raised by a patently false denial that respondent had no knowledge, information or belief concerning a matter handled solely by his administrative agency. Such pro forma denial was improper and fails to fall within the scope of Rule 8(b), Federal Rules of Civil Procedure, authorization. It clearly appears from the answer that respondent had knowledge and information sufficient to affirmatively allege that petitioners were not United States citizens, that they were aliens, that they had no rights or privileges as citizens, and that they were not the blood children of the person through whom they claim to have acquired United States nationality.

This case proceeded to trial with a complete understanding that there had been an administrative rejection of the claim and that the sole issue was whether petitioners are citizens of the United States. Respondent in his opening statement knew and admitted that petitioner's applications for United States passports had been denied. (See 22 C.F.R. 50.22, Appendix F, infra, pp. 57-59.)

The decision authorizes absolute discretion to shield or refuse to disclose departmental rejection of a United States citizenship claim. It establishes a destructive administrative power to close the door to judicial relief. It abolishes the rule that "all pleadings shall be so construed as to do substantial justice". Rule 8(f) of the Federal Rules of Civil Procedure.

Settlement of the question by this Court is plainly in the public interest, since more than 700 similar cases are now pending in the District Courts of the United States.

For the reasons set forth, it is respectfully submitted that this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
March 21, 1955.

JOSEPH S. HERTOGS,
Attorney for Petitioners.

(Appendices "A" through "F" Follow.)

Appendix "A"

United States Court of Appeals
For the Ninth Circuit

Fong Wone Jing, Fong Hung Wing and Fong Ngar Jing, by their guardian ad litem, William Y. Fong, *Appellants,* vs. John Foster Dulles, as Secretary of State, *Appellee.*	No. 13,745 Nov. 23, 1954

Appeal from the United States District Court,
Northern District of California,
Southern Division.

Before DENMAN, Chief Judge and MATTHEWS and BONE, Circuit Judges.

MATTHEWS, Circuit Judge.

On January 29, 1952, in the United States District Court for the Northern District of California, appellants, Fong Wone Jing, Fong Hung Wing and Fong Ngar Jing, by their guardian ad litem, William Y. Fong, instituted an action[1] against Dean Acheson, as

[1]According to the complaint, Fong Wone Jing was born on January 7, 1934, Fong Hung Wing was born on January 30, 1936, and Fong Ngar Jing was born on November 7, 1937. Thus, according to the complaint, appellants were infants when the action was instituted and at all pertinent times thereafter.

Secretary of State of the United States,[2] for a judgment declaring appellants to be nationals of the United States. The Secretary answered the complaint,[3] a trial was had, and on February 18, 1953, a judgment was entered denying the relief sought by appellants. From that judgment this appeal was taken on February 26, 1953.

Jurisdiction of this action was conferred on the District Court by 8 U.S.C.A. §903,[4] which provided: "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. * * *"

Appellants were born in China and, up to the time the action was instituted, had not entered the United

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[2]Acheson's successor, John Foster Dulles, was substituted for Acheson on February 17, 1953.

[3]The complaint was called a petition.

[4]Section 903 was repealed by § 403(a) of the Immigration and Nationality Act, 66 Stat. 279, 280, effective December 24, 1952. However, this action, having been instituted before December 24, 1952, was not affected by the repeal. See § 405(a) of the Immigration and Nationality Act, 66 Stat. 280. The subject matter of § 903 is now covered by 8 U.S.C.A. § 1503.

States. The Secretary therefore contends that the District Court had no jurisdiction under §903. There is no merit in this contention. See Lee Wing Hong v. Dulles, 7 Cir., 214 F. 2d 753.

The complaint alleged: "That on or about January 24, 1951, an application was filed with the American Consulate General at Hong Kong for the issuance of a United States passport or travel document in behalf of * * * Fong Hung Wing; that on or about May 10, 1951, an application was filed with the American Consulate General at Hong Kong for the issuance of a United States passport or travel document in behalf of * * * Fong Wone Jing and Fong Ngar Jing; that the applicants and each of them were informed by the American Consulate General at Hong Kong on or about January 24, 1952, that their applications for documentation had been denied, and that 'the Consulate General declines to afford you facilities for the execution of an affidavit for the purpose of traveling to the United States;' * * * that the refusal of the American Consulate General at Hong Kong to permit [appellants] to proceed to a port of entry in the United States for the purpose of having their admissibility determined by the administrative agency charged with such duty is an arbitrary and unreasonable refusal or denial of a right or privilege of a United States national; * * * that [appellants'] applications for documentation as United States citizens were denied by the American Consulate General at Hong Kong * * * on or about January 24, 1952; that the Department of State through its official executive

at Hong Kong did, on or about January 24, 1952, deny [appellants], and each of them, a right or privilege as nationals of the United States; * * *"

Except as indicated above, there was no allegation that any of the appellants had claimed a right or privilege as a national of the United States and had been denied such right or privilege by a Department or agency, or executive official thereof, upon the ground that he or she[5] was not a national of the United States.

All of the above quoted allegations of the complaint were denied by the answer. None of them was proved. The burden of proof was on appellants[6] and was not sustained. There was no evidence nor any finding nor any basis for a finding that any of the appellants had claimed a right or privilege as a national of the United States and had been denied such right or privilege by a Department or agency, or executive official thereof, upon the ground that he or she was not a national of the United States.

Judgment affirmed.

(Endorsed:) Opinion. Filed Nov. 23, 1954.
Paul P. O'Brien, Clerk.

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[5]Fong Wone Jing and Fong Ngar Jing are girls. Fong Hung Wing is a boy.

[6]Bauer v. Clark, 7 Cir., 161 F. 2d 397; Elias v. Dulles, 1 Cir., 211 F. 2d 520.

Appendix "B"

United States Court of Appeals
For the Ninth Circuit

Fong Wone Jing, Fong Hung Wing and Fong Ngar Jing, by their guardian ad litem, William Y. Fong, *Appellants,* vs. John Foster Dulles, as Secretary of State, *Appellee.*	No. 13,745 Aug. 18, 1954

Appeal from the United States District Court,
Northern District of California,
Southern Division.

Before: DENMAN, Chief Judge and MATHEWS and BONE, Circuit Judges.

DENMAN, Chief Judge:

Appellants seek reversal of a judgment denying them declarations that they are United States nationals.

The oldest appellant (19 years) claims derivative citizenship by virtue of §1993, Rev. Stats. The two youngest claim derivative citizenship as a consequence

of the same section as amended by 48 Stat. 797 (Act of May 24, 1934). There is no dispute over the proper interpretation of this statute in its original form or as amended.

Appellants, who were all born in China, claim to be the offspring of a Chinese father who was an American citizen. The purported father apparently died in China. The mother, who is not a United States citizen, cannot be reached as she is in the interior of China.

Dulles contends that the district court is without jurisdiction under 8 U.S.C. §903 to entertain the action. Section 903 so far as pertinent reads:

> "If any person who *claims* a right or privilege, as a national of the United States, is *denied* such right or privilege . . . upon the ground that he is *not a national* of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action . . . in the District Court . . . for the District of Columbia or in the district in which such person *claims a permanent residence* for a judgment declaring him to be a national of the United States . . ." (Emphasis supplied.)

Appellants' complaint below alleges that each claimed he is a national, that being in China he sought as such national the privilege of a passport or travel document by an application to the American Consulate General at Hong Kong, which application was denied. Each further claimed permanent residence within the Northern District of California and in the

jurisdiction of the district court. These allegations clearly bring the complaint within the words of the above provisions of §903.

The government contends that this section was not intended to apply to a case such as the one before the court. The attorney general argues that it was the intent of Congress only to give persons who were United States born or naturalized citizens a day in court. This interpretation is contrary to the ordinary meaning of the words of the statute. In Look Yun Line v. Acheson, 87 F. Supp. 463 (1949), Judge Erskine decided against the government's contention both as to the plain meaning of the statute and its Congressional history. With this decision we are in accord as is the Seventh Circuit in Lee Wing Hong v. Dulles, No. 10,985, decided July 30, 1954.

Appellee contends that appellants have failed to prove that they claimed a right or privilege as a national or that it was denied. At the hearing, counsel for appellee admitted in his opening statement that the claimed applications and denials thereof had occurred.

Appellee further contends that the denial was not of a right or privilege of a United States national. There is no merit to this contention. The passports or travel documents were necessary to enable appellants to travel to the United States. Appellee's position is not in accord with the implication of Acheson v. Yee King Gee, 184 F.2d 382 (Cir. 9) and Schioler v. Secretary of State of United States, 175 F.2d 402

(Cir. 7). The district court had jurisdiction to entertain the complaint.

We think the evidence sustains the findings of the court. As to one of the appellants the proof is that she was born more than a year after her alleged father's departure from China. As to another, a girl, there was testimony she is a boy. As to the third, there is testimony that he was living with his family in China in 1935, whereas the pleading and proof show he was not born until 1936.

The judgment is affirmed.

(Endorsed:) Opinion. Filed Aug. 18, 1954.
Paul P. O'Brien, Clerk.

Appendix "C"

In the United States District Court for the Northern District of California Southern Division

Ly Shew, as guardian ad litem for Ly Moon, *Plaintiff*, vs. Dean Acheson, as Secretary of State, *Defendant.*	No. 30,159
Ly Shew, as guardian ad litem of Ly Sue Ning, *Plaintiff*, vs. Dean Acheson, as Secretary of State, *Defendant.*	No. 31,161

Stanley J. Gale,
320 Ochsner Building,
Sacramento, Calif.,
Attorney for Plaintiff.

Chauncey Tramutolo, United States Attorney,

Charles Elmer Collett, Assistant United States Attorney,
Attorneys for Defendant.

OPINION

GOODMAN, District Judge.

These are two suits, among hundreds, filed in this Court by persons of Chinese ancestry, pursuant to Section 503 of the Nationality Act of 1940 (8 U.S.C. 903) seeking judgment declaring plaintiffs to be nationals of the United States. Ly Moon, plaintiff in #31,059, aged approximately seventeen years at the time of filing of the complaint herein, and Ly Sue Ning, plaintiff in #31,161, aged approximately fifteen years, both claim to be the blood children of one Ly Shew, the latter admittedly a male citizen of the United States by derivation. Ly Moon alleges that he was born in China, the son of Ly Shew and one Ly Chin Shee, on or about October 18, 1933; Ly Sue Ning alleges that she is the daughter of Ly Shew and Ly Chin Shee, born in China on or about January 26, 1937. Neither has ever been in the United States except for the immediate purpose of prosecuting these actions. Both claim United States citizenship by virtue of Section 1993 of the Revised Statutes[1] which bestowed citizenship upon foreign-born children of citizen fathers. Ly Moon's claim *does* arise under Section 1993 because that statute was effective at the time of his birth. But Section 1993 was amended in 1934, prior to Ly Sue Ning's birth, by the Act of

[1]Sec. 1993. All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

May 24, 1934, 48 Stat. 797.[2] The amendment provided that United States citizenship should not descend to a foreign-born child of a citizen father until the child had resided in the United States for five years continuously preceding his eighteenth birthday. Ly Sue Ning has not and could not now meet that condition. Her claim to citizenship must rest upon Sections 201(g) and (h) of the Nationality Act of 1940, 8 U.S.C. 601(g), (h),[3] which supercede Section

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[2]Sec. 797. Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the right of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization.

[3](g) A person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years the other being an alien: Provided, That, in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: Provided further, That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years his American citizenship shall thereupon cease.

(h) "The foregoing provisions of subsection (g) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934. • • •"

1993 of the Revised Statutes. These Sections of the Nationality Act retroactively vest United States citizenship in a citizen's child born abroad after May 24, 1934, the effective date of the amendment to Section 1993, subject to divestment if the child does not reside in the United States for a period totaling five years between the ages of thirteen and twenty-one.

The testimony at the trial, which lasted three days, was entirely given in the Toy Shan Chinese dialect and interpreted into English. Neither Ly Shew, the alleged father, nor the plaintiffs, nor the witnesses in behalf of plaintiff, could speak a word of English.

Many times the interpreter carried on extensive dialogues with the witnesses before obtaining a response to a question propounded. Inconsistencies and contradictions in testimony became manifest. To fairly determine their effect is difficult, if not impossible. Familiar as we are in this court with Chinese-interpreted testimony, it can be categorically stated that it is well-nigh impossible to determine the credibility of such witnesses. At least, after ten years of constant trial work, I find it so. Against this unsatisfactory evidentiary background the following general picture has emerged:

Ly Shew, the alleged father of plaintiffs, was admitted to the United States in July of 1912, as a citizen. His citizenship was derived from his father by virtue of the citizenship of the latter. Ly Shew claims to have been, since his entrance into the United States and up to the time of the trial of the cases, a perma-

nent resident of the City and County of San Francisco, State of California, in this District, making his livelihood here. During the course of the years following his entry into the United States, he made several trips to China. On the occasion of one of these trips in 1932, he claims to have married one Ly Chin Shee in the Toy Shan District, Kwang Tung Province, Canton, China. It does not appear that any marriage, according to Western standards was had, but that a declaration or acknowledgment of some kind, the nature of which is obscure, took place. He claims that in the following year 1933, plaintiff Ly Moon was born and that on a subsequent visit to China in 1937, the plaintiff Ly She Ning was born. He never engaged in any business in China, going there, as he said, to "rest and visit". His permanent residence was always in San Francisco. It may be said, without in any way intending to be facetious, that the main object of his visits to China was for the purpose of procreation. There is testimony that some money was sent to China by Ly Shew from San Francisco to his alleged wife.

As to the paternity of plaintiffs, the government did not and obviously could not present any evidence. For the area within Communist China, wherein plaintiffs claim to have been born and wherein the alleged mother is said to be, and wherein plaintiffs claim to have lived their entire lives, has long been closed to any opportunity for investigation or verification. Thus the only recourse of the defense was to cross-examine the witnesses.

The first, and, indeed the essential requisite to a just decision here, is to determine what standards should be applied in weighing and appraising the evidence offered in behalf of plaintiffs. For these and companion cases are not orthodox adversary suits. Despite the fact that the Secretary of State is party defendant, in every real sense, the people of the United States are defendants. This court is called upon to declare the nationality of plaintiffs. Hence the paramount necessity of an adequate legal yardstick with which to measure the evidence.

Proper selection of standards requires a preliminary consideration of certain historical background. As well it requires an analysis of the statutory history and purpose. And also there is needed an understanding of the unique problem posed by the hundreds of similar cases now before the court.

First as to historical background.

After the discovery of gold in California, a huge number of Chinese immigrants came to the United States, particularly to California. This mass immigration eventually resulted in the enactment of the Chinese Exclusion Acts[4] in 1882, for by that time over 200,000 Chinese had come principally to California. These Acts were, from time to time, extended by successive statutes. They remained in existence until December 17, 1943,[5] when all the Exclusion Acts were repealed. Simultaneously with repeal of the Acts,

[4] 22 Stat. 58.
[5] 57 Stat. 600.

Chinese were made eligible for immigration and naturalization and an annual quota of 105 was established. 57 Stat. 600.

During the years prior to 1943, thousands of American males of Chinese ancestry, being unable, it is asserted, to find spouses in this country, made periodic visits to China and begot offspring. Up until the effective date of the Nationality Act of 1940, Act of Oct. 14, 1940, 8 U.S.C. 501 et seq., there was no specific statutory provision which entitled persons living abroad and claiming United States nationality to have their nationality decreed by court order. So up to that time, American males of Chinese ancestry, who had begotten offspring on visits to China and desired to have the American nationality of such offspring established, as provided, since 1866, by §1993 Revised Statutes, and, since 1934, by 48 Stat. 797, caused such offspring to come to the United States and they were either admitted by Immigration as United States nationals or denied admission. If any further recourse was sought, it was by way of habeas corpus in federal courts to review Immigration administrative decision. Upon such review, as is now well known, the limit or judicial inquiry was whether the administrative proceedings had afforded due process.

As to the history and purpose of §903. 8 U.S.C. 903,[6] authorizing judgments declaratory of United

[6] §903. If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such per-

States citizenship, became effective as a part of the Nationality Act of 1940 on January 13, 1941. But the first Chinese suit under §903 was not commenced until August 1947. *Mah Yung Og v. McGrath,* D.C. 187 Fed.2d 199. And in this District the first Chinese case under §903 was filed June 29, 1949. Two more were filed in the same year. In 1950, 22 additional cases were filed. In 1951, 161 cases were filed. Then came the deluge. By the close of business on December 24, 1952,[7] there were on file in this District a total of 716

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son, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided. Oct. 14, 1940, c. 876, Title I, subchap. V, § 503, 54 Stat. 1171.

[7]By the provisions of the Immigration and Nationality Act of 1952 (McCarran Act) effective December 24, 1952, the remedy of court action granted by former Section 903 is available only to persons who have resided in the United States. Immigration and Nationality Act of 1952, § 360(a). Thus none of the suits now pending in this District could be maintained under the present statute, for none of the plaintiffs have ever resided in the

cases. By the same date, 189 cases had been filed in the Southern District of California, a grand total of 905 cases in both California Districts. As near as may be presently ascertained, a total of 1288 cases (including the California suits) have been commenced in the United States. Of the non-California cases, 9 were filed in the District of Oregon and 61 in the Western District of Washington. Thus 75% of all cases are to be determined in this District.

It has been blithely assumed that plaintiffs, who never have been in the United States and who have lived their lives as Chinese, have the status and right to avail themselves of §903. Let us see, by studying Congressional proceedings and examining the language of the statute and its relation to the Nationality Code, whether this is so.

First of all it should be observed that Section 903 is a part of Subchapter V of the Nationality Code of 1940, which immediately follows Subchapter IV, dealing with the subject of expatriation or loss of nationality. The many new grounds for expatriation created by Subchapter IV prompted the Congress to afford a means of protection for persons abroad charged with being expatriates. While the opening words of Section 903 broadly state that "any person" denied a right of citizenship may seek a declaratory judgment, it is clear that the section was designed primarily to

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United States. There is a possibility, somewhat remote, that the savings clause of the McCarran Act, § 405(a), may permit the filing of some suits under old Section 903, in cases of the vesting of rights prior to the effective date of the McCarran Act. 12, 1952 Congressional & Administrative News, p. 2706.

protect those who might run afoul of the expatriation provisions of Subchapter IV. See 86 Congressional Record 13247-48. Section 903 permits such persons to sue in a Federal District Court, whether "within the United States or abroad".

The Congressional proceedings, plus the place of Section 903 in the Nationality Code, persuasively indicate that, in enacting that Section, the Congress never contemplated that it should be availed of by persons who never have been in the United States and against whom *no charge of expatriation* has been made. That the issue of *expatriation* was the basis upon which the Congress afforded the judicial remedy to those abroad is further manifest by the provision in Section 903 that a "certificate of identity shall not be denied *solely* on the ground that such person has *lost* a status previously had or acquired as a national of the United States."

There is no doubt about the Congressional intent to allow any person *in the United States* to bring suit under Section 903, if any of his rights or privileges as a citizen are denied. But as to those abroad, the objective of the statute is clearly in aid of those charged with expatriation. There is not the slightest evidence that the Congress ever intended Section 903 to encompass a declaratory proceeding to determine the identity of claimants such as plaintiffs.

The real purpose and intent of §903 is pointed out, not because the court intends to rest decision upon an interpretation of the statutory meaning, but to

emphasize the need for careful scrutiny of these and like causes. For it appears that in not one single case of the 716 pending is the issue of expatriation tendered. In each case the issue to be determined is that of *identity,* namely, who is the person who makes the claim of United States Nationality?

As to the special problem of the 716 cases.

In the Southern District of California, in the case of *Mar Gong v. McGranery,* decided Dec. 15, 1952, Judge Westover, who has tried approximately 20[8] of the 189 cases on file in that District, calls attention to the "mutuality" of the facts in the cases of these Chinese born plaintiffs. He points out that: (1) the alleged father is a citizen by derivation; (2) the father returns to the ancestral village to marry; (3) a child is born within a year; (4) the father returns to the United States after the wife has conceived a second time; (5) other children are conceived, in some cases, upon subsequent visits to China; (6) when the children are in midteens, they apply to come to the United States; (7) usually the last-born child is not seen by the father until arrival in the United States; (8) each visit to China produces another "crop" of sons; (9) apparently there is no impotence, because every visit to China results in offspring; (10) the offspring are preponderantly male; (11) the offspring are all born in an unknown rural village, where the

[8]Besides the instant causes, I have heard the cases of four other plaintiffs and am this day filing decisions as to them.

homes and villages are described as being alike; (12) there are no doctors, only midwives; (13) all offspring survive and are strong and healthy.

Substantially most of what Judge Westover says applies to the cases in this District.

It is well to consider these matters, because of the amount of judicial time which may be required to dispose of these causes. We have estimated that it will take the full time of one of the judges of this court 8 years to try and dispose of the cases. And if all seven judges of the court were to devote all their time to their disposition, it would require over one year to clear the calendar of the §903 cases.

The government has contended that the records of the State Department show that many of the applications for certificates of identity made to consular officers in Hong Kong (the only consular office now functioning in continental China) are fraudulent. It further points out the impossibility of checking the identity of the applicants.

A survey of the 716 cases here shows that 95% of the plaintiffs claim to have been born in Kwang Tung Province and *62%* in the *Toy Shan District* of Kwang Tung Province. The villages alleged to be the places of birth are unknown to United States authorities and cannot be located on available maps.

An examination of 354 of the 716 complaints shows 367 of the plaintiffs to be males and 39 to be female. (More than one plaintiff is joined in some complaints.)

The Department of Justice has made an examination of 317 suits filed elsewhere in the United States. Statistics revealed in these suits show that among the families concerned in these 317 suits, 1215 male children were born as against 169 female. The Department of Justice also reports that a survey made in Hong Kong recently reveals that of 149 applicants for certificates of identity, there was a ratio of 9 to 1 male births.

Statistics recently collected by the State Department from applications for certificates of identity filed in Hong Kong show that a preponderance of applicants claim birth on the day of the month corresponding to the number of the month, for example, the 2nd day of the 2nd month of the Chinese calendar.

The government contends that this is indicative of fraud in that the dates are selected to make them easy to memorize.

In this district between the years 1947 to 1950 inclusive there were 53 criminal prosecutions against Chinese for false claims of citizenship due to falsified birth certificates or travel documents. This is exclusive of a great many cases not prosecuted because of lack of evidence of criminal intent.

Consideration of these factors and circumstances does not mean that the court is conducting an investigation for the purpose of summarily disposing of all these cases. They are related solely in order to furnish some guide and aid in the judicial process of evaluating testimony offered to support claims to the

priceless right of American citizenship. For each one of these cases requires the determination of the *identity* of the claimant to citizenship. And such identity rests upon evidence given in a foreign language as to birth, in an inaccessible foreign area, of persons born and living under a completely foreign culture, with no means of investigation or verification open to the people of the United States, who are vitally concerned. Furthermore, it is a foreign culture, which does not generally recognize ethical demands beyond family loyalty.[9]

The plaintiffs have alleged in their complaint that they have always considered themselves to be citizens of the United States and that it has *always* been their intention to come to the United States and further that it has *always* been their intention to keep and maintain their domicile and residence in the United States. But the evidence indisputably shows this to be untrue. To the contrary, the evidence shows these minor children to be Chinese in every sense of the word. They know, and knew, nothing about the United States except that their alleged father seeks to bring them here. And they come in compliance with that filial dictate.

Standards to be Applied in Weighing the Testimony.

A proceeding under §903 is a primary and original action. In my opinion, it is not a de novo proceeding,

[9]See F. S. C. Northrup, The Taming of the Nations, MacMillan 1952; also Lin Yutang, My Country and My People, John Day, N.Y. 1939.

as has been stated. For to denominate a suit as de novo means that there has been some other proceeding concerning the same issue, but that the instant cause is being heard independent of such prior proceeding.

But whether the suit be primary or de novo, the burden of proving plaintiffs' identity rests upon plaintiffs. Particularly is this so when the burden is to prove claimants' United States citizenship. Upon review of immigration proceedings where entry into the United States was sought by Chinese applicants upon the ground that the applicants were United States citizens, it has been held that the burden of proving applicants to be children of American citizens rested upon applicants. *Wong Ying Loon v. Carr,* 9 Cir. 108 F.2d 91; *Yee Suey v. Ward,* 1 Cir. 104 F.2d 900; Ex parte Lee Fong Fook, 74 Fed.Supp. 68.

It would seem beyond question that a similar burden rests upon plaintiffs here.

Against the background of considerations described supra, what is the nature and extent of the burden of proof of plaintiffs?

Plaintiffs contend that they have made a *prima facie* case, that the burden of going forward consequently shifted to the defense, that since the defense presented no evidence, it failed to carry its burden, ergo, judgment should go for plaintiffs. Such reasoning begs the question as to what constitutes a *prima facie* case in this sort of proceeding. Whether or not the showing made is *prima facie* depends upon the nature and extent of the burden of proof.

The burden of proof resting upon plaintiffs is to show that they are *persons* who, because of their *identity,* are entitled to be judicially declared to be American citizens.

This brings us to a consideration of what degree of proof is necessary in order to establish their identity.

Constitutionally, only those born or naturalized in the United States and subject to the jurisdiction thereof, are citizens. Const. Amdt. XIV. The power to fix and determine the rules of naturalization is vested in the Congress. Const. Art. I, sec. 8, Cl. 4. Since all persons born outside of the United States, are "foreigners",[10] and not subject to the jurisdiction of the United States, the statutes, such as §1993 and 8 U.S.C. 601, derive their validity from the naturalization power of the Congress. *Elk v. Wilkins,* 112 U.S. 94, 101; *Wong Kim Ark v. U. S.,* 169 U.S. 649, 702 (1898). Persons in whom citizenship is vested by such statutes are naturalized citizens and not native-born citizens. *Zimmer v. Acheson,* 191 F.2d 209, 211 (10 Cir. 1951); *Wong Kim Ark v. U. S.,* supra.

While under §903, the courts are not granted the jurisdiction to "admit" to citizenship, as under the naturalization statutes, the jurisdiction to "declare" citizenship by naturalization pursuant to §903 is substantially equivalent. This is so because under §903, a decree favorable to petitioner in effect "makes" peti-

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[10]See Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135; U.S. v. Harbanuk, 1 Cir., 62 F.2d 759, 761.

tioner a citizen, whereas an unfavorable decree requires deportation to the foreign land of birth. Consequently, in my opinion, a decree *declaring* citizenship by naturalization is in all respects the same as a decree *admitting* to citizenship. Indeed, the consequences of denying the prayer of petitioners here are much more dire than those resulting from denying petitions for naturalization, for in the latter case the petitioners may remain, in most cases, in the United States, while in the former, the result is deportation.

The degree of proof therefore, required of plaintiffs, should be of substantive parity with that required of petitioners for naturalization.

It has been the rule in naturalization cases that an applicant for citizenship has the burden of convincing the court by satisfactory evidence that he is entitled to citizenship.[11] And that burden never shifts to the government.[12] In the reverse process of denaturalization, the rule is that citizenship may not be annulled except by clear, unequivocal and convincing evidence.[13]

Where entry into the United States is sought upon the basis of the entrant's claim to United States citi-

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[11]U.S. v. Schwimmer, 279 U.S. 644, 649 (1929); Tutun v. U.S., 270 U.S. 568, 578 (1926); U.S. v. Macintosh, 283 U.S. 605 (1931); In re Laws, 59 Fed.Supp. 179 (N.D.Cal. 1944); Petition of Boric, 61 Fed.Supp. 133, 136 (Ore. 1945); Petition of Sam Hoo, 63 Fed.Supp. 439 (N.D.Cal. 1945).

[12]See cases cited in Note 11.

[13]Schneiderman v. U.S., 320 U.S. 118 (1943); Baumgarten v. U.S., 322 U.S. 665 (1944).

zenship, the rule is that the proof of alleged citizenship must be clear and convincing.[14]

Clear and convincing proof is a standard frequently imposed in civil cases where the wisdom of experience has demonstrated the need for greater certainty.[15] This high standard may be required to sustain claims which have serious social consequences or harsh or far-reaching effects on individuals.[16] To justify an exceptional judicial remedy[17] or to circumvent established legal safeguards,[18] the proof must usually meet this standard. Instruments which have established legal rights and warrant great reliance may not be contradicted except by this degree of proof.[19] As

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[14]Lee Sim v. U.S., 218 Fed. 432, 435 (2 Cir. 1914); Ex parte Chin Him, et al., 227 Fed. 131, 133 (W.D. N.Y. 1915).

[15]IX Wigmore on Evidence § 2498 at page 329 (3rd Ed. 1940); 32 Corpus Juris Secundum, Evidence § 1023 (1942); 20 American Jurisprudence, Evidence §§ 1252-53 (1939).

[16]Eg. Note, 128 A.L.R. 713 (1940) (degree of proof to establish the illegitimacy of children born in wedlock); Note, 13 Minnesota Law Review 580 (1929) (proof of adultery in divorce actions); Note, 12 A.L.R.2d 153 (1950) (showing necessary for rescission of divorce decree after remarriage); Commissioner v. Ryan, 238 App.Div. 607, 265 N.Y.S. 286 (1933) (proof in filiation proceeding); Johnson v. Feskens, 146 Or. 657, 31 P.2d 667 (1934) (proof to justify forfeiture under a contract); Dickson v. St. Louis & K. R. Co., 168 Mo. 90, 67 S.W. 642 (1902) (to divest title to real estate for breach of a condition subsequent).

[17]Eg. 49 American Jurisprudence, Specific Performance § 169 (1943) (proof of the existence of a contract when specific performance is demanded).

[18]Eg. 1 American Jurisprudence, Acknowledgment § 155 (1936) (to impeach an acknowledgment).

[19]36 Am. Jur., Mortgages §§ 134-35 (1941); Note, L.R.A. 1916B 192 (to show an absolute deed is a mortgage); 9 Am. Jur., Cancellation of Instruments § 63 (1937); 45 Am. Jur., Reformation of Instruments §§ 116-17 (1943); Note, 94 A.L.R. 1278 (1935); Note, 48 A.L.R. 1462 (1927); 117 A.L.R. 1022 (1938) (to justify reformation or rescission of a written instrument for fraud, mistake, or undue influence).

well, this standard is employed in cases where the opportunity for fraud and the temptation to perjury is great. Thus, this standard must be met to sustain certain claims which are easily fabricated and difficult to disprove, or which are evidenced merely by the oral testimony of interested witnesses as to events long past.[20]

The factors which have prompted the courts to exact a high standard of proof in other cases, are present to a great degree in these Section 903 cases. A judgment declaratory of the American citizenship of a person who has grown up in an alien culture and whose only claim to citizenship is based on heredity vitally affects the American people. All the rights and privileges of citizenship would be thereby vested in a person totally unprepared to exercise them.

Both the temptation and the opportunity for fraud is great in these cases. American citizenship is indeed a prize for those persons seeking to escape the misery of Communist China. A plausible claim is easily presented and virtually impossible for the gov-

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[20]Eg. 57 Am. Jur., Wills §§ 981-83 (1948) (to prove a lost will); 57 Am. Jur., Wills § 728 (1948); Note, 69 A.L.R. 167 (1930) (to prove agreement to leave property to another); Note, 7 A.L.R.2d 25 (1949) (proof of agreement for compensation for services rendered to a relative); 24 Am. Jur., Gifts § 133 (1933) (to prove a parol gift after the death of the donor); 54 Am. Jur., Trusts §§ 620-24 (1945); 23 A.L.R. 1500 (1923) (oral proof of an express trust in realty or personalty or of facts giving rise to a resulting or constructive trust); Furman v. St. Louis Union Trust Co., 338 Mo. 884, 92 S.W.2d 726 (1936) (agreement to adopt as basis for sustaining right to inheritance); The Barbed Wire Patent, 143 U.S. 275 at 284 (1892) (to prove prior anticipatory use of an invention); Commissioner v. Ryan, 238 App.Div. 607, 265 N.Y.S. 286 (1933) (proof in filiation proceedings).

ernment to meet. The facts to substantiate the claim rest almost entirely within the sole knowledge of interested persons.

The standard of clear and convincing proof, I hold, should be applied in all cases where an applicant *invokes the judicial power* to affirm a claimed right of United States citizenship by naturalization. It should be applied in these §903 cases.

Since I find the evidence presented in support of plaintiffs' cause to be neither satisfactory nor clear nor convincing, they have not sustained their burden of proof and their prayer should be denied.

The court does not find that the plaintiffs and their witnesses are not telling the truth. But rather I cannot tell whether they are or not. Their evidence has neither the satisfactoriness or clarity or convincing character that justifies, in effect, the conferring of American citizenship. It may well be that Ly Shew is the father of the two plaintiffs. In denying the relief asked for in the complaint, I am not finding that he is not their father. I am denying the petition because the evidence does not meet the proper standards. In some respects it is so inconsistent as not to be credible. It may be said, and indeed was argued, that a decision adverse to the plaintiffs is cruel and that its effect is to separate a father from his children and to break up the home. The short answer is that the plaintiffs have always been with the alleged mother in China. Their home has always been there. The alleged father has rarely, if at all, seen the plain-

tiffs. In fact he never had seen the plaintiff Ly Sue Ning until she arrived in the United States. The father's permanent residence has always been in the United States. He has never had any home in China. For all practical purposes, the plaintiff children are strangers to him. So what is defeated by denial of relief here is not the family home but the effort to come into the United States.

During the trial, the government moved to strike certain statements of plaintiffs and their alleged father as to the alleged father's paternity. The statements were claimed to be admissible under the so-called "pedigree" exception to the hearsay rule. Upon the record, I see no need for resolving the claimed issue of law. I will allow the testimony to remain in the record. For I attach no weight to it. "The mere say-so of interested witnesses does not have to be accepted." *Flynn ex rel. Yee Suey v. Ward,* 104 F.2d 902. (1 Cir. 1939.)

We can well understand the desire of those who speak for plaintiffs to have them admitted and join the American Citizenry. In every sense, so far as I am concerned, this is "God's Country." But as a court, we are guardians and custodians of a precious fund. Every American citizen has the right to demand that we do not dispense the fund except to those who are unequivocally entitled to share in it. If we are satisfied to apply any lesser standards in these cases, we might just as well issue a rubber stamp decree admitting all the plaintiffs in the 716 suits filed

in this district. But this would be a completely unbecoming judicial act and obviously I won't perform it.

Judgment for defendant upon findings to be presented pursuant to the Rules.

Dated, January 12, 1953.

(NOTE): The decision in the above-entitled case was reversed and remanded to the District Court for further consideration in accordance with the views of the Court of Appeals for the Ninth Circuit, as expressed in its decision dated December 30, 1954.

Appendix "D"

United States Court of Appeals
for the Ninth Circuit

LY SHEW, as Guardian Ad Litem of Ly Moon and Ly Sue Ning, minors, *Appellant*, vs. JOHN FOSTER DULLES, as Secretary of State of the United States, *Appellee.*	No. 13,808 Aug. 18, 1954

Appeal from the United States District Court for the Northern District of California, Southern Division.

Before: DENMAN, Chief Judge, and MATHEWS and BONE, Circuit Judges.

DENMAN, Chief Judge:

Ly Shew, an American citizen resident in California, as guardian of a girl Ly Sue Ning and a boy Ly Moon, appeals from a judgment in a proceeding under 8 U.S.C. 903, holding that neither is a child of Ly Shew and hence not a national of the United States. Jurisdiction is lacking, Dulles contends, on the grounds considered and disposed of adversely to the contentions in our decisions in Fone Wong Jing, et al., v. Dulles, No. 13,745, and Brownell v. Lee Mon Hong, No. 13,957, this day filed.

Ly Shew contends (a) that an erroneous and excessive burden of proof was applied by the district court and (b) that the evidence considered on the applicable burden requires a judgment that the girl and boy were nationals of the United States.

The evidence offered on behalf of the girl and the boy is as follows:

1. Ly Shew testified that appellants were his children. He said Ly Moon, the boy, was born while he was in China on a visit and that Ly Sue Ning, the girl, was being carried by his wife when he departed. Cancelled checks that he had sent to China for family support were offered but were excluded, we think erroneously, but not affecting the present decision.

2. Ly On testified that he was admitted to the United States as a citizen and as the son of Ly Shew in 1947. He testified that he entered with another brother and his sister, Ly Sue Ngor. He testified that he lived with appellants and otherwise treated them as brother and sister.

3. In court appellants and Ly On simultaneously drew diagrams of the Chinese village where they lived. No conflict here appeared.

4. Ly Moon and Ly Sue Ning both testified they were Ly Shew's children, clearly relevant in connection with the other testimony. Fulkerson v. Holmes, 116 U.S. 389, 397.

5. Leong Yen Way, not a member of the family, was admitted to the United States in 1949. At the time of the trial, he was serving as a soldier in the

United States army. He testified that he visited appellants' family in China in 1948. He testified that he was given a package by them to bring to the father in the United States. He identified appellants as the same persons he had seen in China.

6. Ly Sue Ngor testified that she regarded Ly Shew as her father and Ly Moon and Ly Sue Ning as her brother and sister. She testified that when she left China in 1947, Ly Sue Ning was eleven and Ly Moon fifteen years of age. She said she helped rear the appellants, as an older sister would.

The government's brief does not quarrel with the evidence adduced by appellants, except to the extent that it had attempted to cast doubt on Ly Sue Ngor's credibility by raising doubts as to issues collateral to the issue of her statement of Ly Shew's paternity, a matter not affecting the validity of the others and her testimony. Mar Gong v. Brownell, 209 F.2d 448, 451.

A. *The district court's reason for a "high" burden of proof.*

Although the above evidence uncontradicted in its essentials clearly establishes the United States nationality of the girl and boy children of Ly Shew on the ordinary burden of proof by the preponderance of the evidence, the district court applied what it calls a "high standard," higher than in an ordinary case. It holds that in § 903 "the rule is that the proof of alleged citizenship must be clear and convincing." Its extended reasoning for such a higher standard begins as follows:

> "The first, and, indeed the essential requisite to a just decision here, is to determine *what standards should be applied in weighing and appraising the evidence offered in behalf of plaintiffs. For these and companion cases are not orthodox adversary suits.* Despite the fact that the Secretary of State is party defendant, in every real sense, the people of the United States are defendants. This court is called upon to declare the nationality of plaintiffs. Hence the paramount necessity of an adequate legal yardstick with which to measure the evidence." (Emphasis supplied.)

In determining what burden of proof is applicable, the district court lays great stress on the fact that there are pending in that court 716 cases for the determination of the nationality of Chinese-born persons under § 903, which will require all its judges a year's time for their disposition or for a single judge eight years. This seems a strange reason for creating a strict burden of proof for citizens of Chinese ancestry, while it is most unlikely it would be thought of if but three American citizens born in, say, France were seeking relief under § 903.[1]

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[1]This court has stated in reversing in Lau Hu Yuen v. United States, 85 F.2d 327, 330, that:

> "In certain communities prejudices are said to exist favoring the integrity of testimony of white persons, particularly the so-called 'Nordics', against the red-skinned Indian, the yellow Chinese and Japanese, the dark-complexioned Mediterranean, and darker African. Though its reassertion be trite, we take judicial notice that neither the sense of color nor historical racial antagonisms afford criteria of integrity of the mind."

Nor does the district court give consideration to the fact that § 903 was repealed, thus taking from the federal courts the jurisdiction here exercised, and that the fathers of these children hastened to have these suits brought prior to the effective date of the repealing legislation, 180 days after June 27, 1952. Pressure of business on the court from such an exceptional cause is no foundation for changing the rules of evidence.

As a suggestion of the likelihood of perjury, the court points out: "A survey of the 716 cases here shows that 95% of the plaintiffs claim to have been born in Kwang Tung province and 62% in the Toy Shan District of Kwang Tung province . . ." It fails to point out that Kwang Tung province is *the only one* of the 18 provinces of the great area of China which surrounds the British city, Hong Kong, into which the nearby children of American parents could easily enter, thus freeing themselves from Bolshevik China. None of the other seventeen provinces has such a foreign city on its borders.

Further, the district court stresses, as indicating the likelihood of perjury, the fact that: "An examination of 354 of the 716 complaints shows 367 of the plaintiffs to be males and 39 to be female." It is difficult to see how this is applicable to the instant case where of the two persons for whom declaration of citizenship is sought one is a girl and the record shows that another girl, her sister, had been previously admitted as such a citizen and is now living with her father, Ly Shew.

Assuming, however, that both of Ly Shew's claimed children were boys, the high percentage of male children for whom their parents seek admission is clearly understandable to any one having even a slight knowledge of the high status of the son in the predominant religion of China[2] and the low status there of the

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[2]LaTourette, "The Chinese" (1946), 678:

"Closely associated with the family system, and possibly as one of its corollaries, have been the relations between men and women and the position of women. The ceremonies in honor of ancestors have constituted a cornerstone of the Chinese family. *Male progeny has been necessary if these were to be continued.* For this reason boys have been regarded as more valuable than girls. To the *high esteem for men* other factors have contributed. From the economic standpoint boys have been preferable. Remaining in the family as they do, they are producers who throughout their working lives aid its prosperity. On the other hand, after marriage a girl is lost to the family which has been to the expense of rearing her. The centuries-old doctrine of *yin* and *yang* has made for the higher status of men, because the *yang*, associated with good fortune and all that is desirable, has been identified with the male, and the *yin*, the element of darkness and evil, is female . . ." (Emphasis supplied.)

Encyclopedia Britannica, 14th Ed., Vol. 5, p. 524:

"Religion.—The three great religions of China are Confucianism, Taoism and Buddhism. The special feature of local religion is ancestor worship, though Taoism incorporates much that belongs to primitive religions. In China the dead form an important part of every household. A third son is always a third son, even if his elder brothers are dead. The head of the house, living or dead, is always the head of the house. To his tomb his descendants come, and they have mortgaged much of their scanty acres in erecting grave mounds which must never be ploughed till the family is forgotten. Against such a calamity every precaution is taken by adopting children when sons fail." In the instant case there was no evidence of adoption.

female child[3]—this apart from the much higher earning capacity of the male child. That American fathers of Chinese-born children prefer to leave their daughters in China is no evidence that the testimony concerning the birth of their sons is perjured, though, as in any case, there may be perjury from other motives.

Those who ironically comment on the power of male procreation by American-born Chinamen mating with their wives in China seem ignorant of the above facts.

Finally, in deciding against Ly Shew's paternity of this boy and this girl, the court states: ". . . In every sense, so far as I am concerned, this is 'God's Country'. But as a court, we are guardians and custodians of a precious fund. Every American citizen has the right to demand that we do not dispense the fund except to those who are unequivocally entitled to share in it. If we are satisfied to apply any lesser standards in these cases, we might just as well issue a rubber stamp decree admitting all the plaintiffs in the 716 suits filed in this district . . . ."

One wonders whether the omniscient and omnipotent Creator of the Universe, the God of the Christo-Hebraic religion of the majority of American people, has given their country such an exceptional and ap-

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[3]Encyclopedia Britannica, 14th Ed., Vol. 5, p. 516:

". . . Especially notable is its vigorous and unsparing attack on the inferior status of women, child betrothals and costly expenditure on funeral rites . . ."

LaTourette, "The Chinese" (1946), 674:

". . . In the case of poorer families, daughters may be sold into what is little better than slavery, or even into prostitution."

parently exclusive position, as distinguished say, from Great Britain, from which the laws controlling our democracy are derived; or whether China is no longer one of God's countries, where the "golden rule" was stated by Confucius five hundred years before the birth of Christ. It is difficult to see how this contention supports a heavier burden of proof on persons of Chinese descent.

Regarding rubber stamping the 716 suits, this seems somewhat of an overstatement in view of the fact that in two of the three § 903 appeals today decided from decisions of the judge above quoted, the paternity of the claimed father was held not proved.

B. *In cases under 8 U.S.C. 903 the ordinary burden of proof prevails. A higher burden of "clear and convincing evidence" is not required.*

The only court of appeals authority cited by the district court to sustain its contention in a case in which the burden of proving claimed citizenship is required to be clear and convincing is a 1914 decision of the Second Circuit, Lee Sim v. United States, 218 Fed. 432, 435, followed by Ex Parte Chin Him, 227 Fed. 131 (W.D., N.Y.). That court of appeals is doubly wrong in its following holding on page 435:

> "In these deportation proceedings there is *a natural presumption* that a person of the Mongolian race is an alien, and it is essential that the evidence to overcome it and to show that the man is entitled to the privileges of citizenship in the United States should be clear and convincing . . ." (Emphasis supplied.)

There is no such presumption. Up to the Exclusion Act of 1882 scores of thousands of Chinese Mongolians had entered the United States and by 1914 hundreds of Chinese-born persons had sought admission as citizens and many had been admitted, also many children of Cinese parents had been born in the United States. The court's statement of the presumption is a judicial absurdity.

With regard to the presumption even if it existed, its rebuttal does not require clear and convincing evidence. In the federal courts a presumption disappears when any substantial evidence to the contrary is offered. New York Life Insurance Co. v. Gamer, 303 U.S. 161, 170.

The last census shows that there are 117,140 Chinese in the United States, of whom but 35,040 are aliens. It cannot be that the district court is today relying on the presumption of the Lee Sim and Chin Him cases. Yet they are his only authorities in a case in which a Chinese is seeking to establish his citizenship.

The strange rule of the Second Circuit, considered above, no longer prevails there, for in Pandolpho v. Acheson, 202 F.2d 38, 40, where Pandolpho had the § 903 burden, it was held that he had made out a prima facie case by merely proving his birth in New York. Here is no suggestion that he had more than the ordinary burden.

This court has repeatedly stated in Chinese citizenship cases that the "right to citizenship is a priceless thing" to the person seeking to establish it. Wong

Wing Foo v. McGrath, 196 F.2d 120, 122. A more expanded statement in another Chinese citizenship case is that of the Supreme Court in Kwock Jan Fat v. White, 253 U.S. 454, 464, that:

> "* * * It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."

With such a view of the value of our citizenship, one would not expect an exceptionally high burden of proof in establishing it, and a further search of the cases since our decision in the Mar Gong case reveals none so stating or holding. On the contrary, once that "priceless" right is established, the burden on the United States for its deprivation is that the proof shall be "clear, unequivocal and convincing." Baumgartner v. United States, 332 U.S. 665, 671.

Because the factual matters stated by the district court to sustain its higher burden of proof were not presented to us in Mar Gong v. Brownell, 209 F.2d 448, we have given them the above consideration. It reinforces our holding at page 453: "We recognize all that may be said with respect to the necessity of the court guarding against imposition, but we also are of the view that no special quantum of proof should be exacted from any person claiming American citizenship merely because of his racial origin. * * *"

The Seventh Circuit in its recent fully considered opinion holds as we do in all the above considered mat-

ters. Lee Wing Hong v. Dulles, No. 10,985, decided July 30, 1954.

Since the evidence fully supports the contention of the girl, Ly Sue Ning, and the boy, Ly Moon, that they are the children of the citizen Ly Shew and is uncontradicted, the judgment is reversed and a judgment in their favor is ordered entered.

MATHEWS, Circuit Judge, concurs in the result.

BONE, Circuit Judge, dissenting.

I agree with the views set forth in the opinion of the trial court, 110 Fed. Supp. 50, and therefore dissent.

(Endorsed:) Opinion, Concurrence and Dissenting Opinion. Filed Aug 18, 1954. Paul P. O'Brien, Clerk.

Appendix "E"

Amended Opinions

United States Court of Appeals
for the Ninth Circuit

LY SHEW, as guardian ad litem of Ly Moon and Ly Sue Ning, *Appellant*, vs. JOHN FOSTER DULLES, as Secretary of State of the United States, *Appellee.*	No. 13,808 Dec. 30, 1954

Appeal from the United States District Court for the Northern District of California, Southern Division.

Before DENMAN, Chief Judge, and MATHEWS and BONE, Circuit Judges.

MATHEWS, Circuit Judge.

On or before November 8, 1950, the United States District Court for the Northern District of California appointed Ly Shew as guardian ad litem of a boy who called himself and claimed to be Ly Moon and is hereafter called Moon. On November 8, 1950,

Moon, by his guardian ad litem, Ly Shew, instituted an action[1] in the District Court against Dean Acheson, as Secretary of State of the United States, for a judgment declaring Moon to be a citizen and national of the United States.

On or before January 11, 1952, the District Court appointed Ly Shew as guardian ad litem of a girl who called herself and claimed to be Ly Sue Ning and is hereafter called Ning. On January 11, 1952, Ning, by her guardian ad litem, Ly Shew, instituted an action[2] in the District Court against Secretary Acheson[3] for a judgment declaring her to be a citizen and national of the United States.

The Secretary answered the complaints,[4] the actions were consolidated, a trial was had, an opinion[5] was filed, findings of fact and conclusions of law were stated, and on February 18, 1953, a judgment was entered denying the relief sought by Moon and Ning. From that judgment this appeal was taken on March 18, 1953.

The appeal was heard on July 16, 1954. On August 18, 1954, this court (Judge Bone dissenting) entered a judgment reversing the judgment appealed from

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[1]According to his complaint, Moon was born on October 18, 1933, and hence was an infant when his action was instituted and at all pertinent times thereafter.

[2]According to her complaint, Ning was born on January 26, 1937, and hence was an infant when her action was instituted and at all pertinent times thereafter.

[3]In both actions, Acheson's successor, John Foster Dulles, was substituted for Acheson on April 7, 1953.

[4]The complaints were called petitions.

[5]Ly Shew v. Acheson, D.C.N.D.Cal., 110 F. Supp. 50.

and directing the entry of a judgment for Moon and Ning. On September 17, 1954, the Secretary filed a petition for rehearing. Upon consideration thereof, this Court (Judge Denman dissenting) has today vacated its judgment of August 18, 1954, and denied the petition for rehearing.

Jurisdiction of these actions was conferred on the District Court by 8 U.S.C.A. §903,[6] which provided: "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. * * *"

Moon and Ning were born in China and, up to the time the actions were instituted, had not entered the United States. The Secretary therefore contends that the District Court had no jurisdiction under § 903. There is no merit in this contention. See Fong Wone

[6]Section 903 was repealed by § 403(a) of the Immigration and Nationality Act, 66 Stat. 279, 280, effective December 24, 1952. However, these actions, having been instituted before December 24, 1952, were not affected by the repeal. See § 405(a) of the Immigration and Nationality Act, 66 Stat. 280. The subject matter of § 903 is now covered by 8 U.S.C.A. § 1503.

Jing v. Dulles, 9 Cir., ... F.2d .....; Chow Sing v. Brownell, 9 Cir., ... F. 2d .....; Brownell v. Lee Mon Hong, 9 Cir., ... F. 2d .....; Lee Wing Hong v. Dulles, 7 Cir., 214 F. 2d 753.

Moon's complaint alleged, in substance, that he was born in China on October 18, 1933; that Ly Shew was his father; that Ly Shew was a citizen of the United States at the time of Moon's birth and had resided in the United States since July 15, 1912; and that Moon was therefore a citizen of the United States under § 1993 of the Revised Statutes.[7] Ning's complaint alleged, in substance, that she was born in China on January 26, 1937; that Ly Shew was her father; that Ly Shew was a citizen of the United States at the time of her birth and had resided in the United States since July 15, 1912; and that she was therefore a citizen of the United States under § 1993 of the Revised Statutes.[8] Thus, in effect, the complaint alleged that Moon and Ning were nationals as well as citizens of the United States; for, although all nationals of the United States are not citizens thereof, all citizens thereof are nationals thereof.[9]

The answers denied that Ly Shew was the father of Moon and Ning, thus, in effect, denying that Moon and Ning were citizens or nationals of the United States. On the issues thus raised, Moon and Ning

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[7]See 8 U.S.C.A. §§ 6 and 601(g and h).

[8]See 8 U.S.C.A. §§ 6 and 601(g and h).

[9]See 8 U.S.C.A. §§ 501(b) and 1101(a)(22); Chow Sing v. Brownell, supra; Brownell v. Lee Mon Hong, supra; Law Don Shew v. Dulles, 9 Cir., ... F. 2d .....

had the burden of proof,[10] which is to say, the burden of proving that Ly Shew was their father.

Moon and Ning appeared at the trial and, by their guardian ad litem, Ly Shew, introduced evidence[11] some of which tended to show that Ly Shew was the father of persons known as Ly Moon and Ly Sue Ning and that Moon and Ning were those persons. Some of the evidence so tending was uncontradicted. However, the District Court was not required to believe such evidence or to accept it as true.[12]

The District Court found: "That the persons [Moon and Ning] who call themselves Ly Moon and Ly Sue Ning and who claim to be the plaintiffs herein and who claim to be the children of Ly Shew have failed to introduce evidence of sufficient clarity to satisfy or convince this Court that Ly Shew is the natural blood father of the persons known as Ly Moon and Ly Sue Ning * * * or that the persons [Moon and Ning] who appeared before this Court

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[10]Fong Wone Jing v. Dulles, supra; Chow Sing v. Brownell, supra; Brownell v. Lee Mon Hong, supra; Law Don Shew v. Dulles, supra; Bauer v. Clark, 7 Cir., 161 F. 2d 397; Elias v. Dulles, 1 Cir., 211 F. 2d 520.

[11]The evidence introduced by Moon and Ning consisted of the testimony of eight witnesses (Moon, Ning, Ly Shew and five others) and ten exhibits (Nos. 1-3 and 7-13).

[12]Mar Gong v. Brownell, 9 Cir., 209 F. 2d 448; Chow Sing v. Brownell, supra; Law Don Shew v. Dulles, supra. See also Lee Sing Far v. United States, 9 Cir., 94 F. 834; Woey Ho v. United States, 9 Cir., 109 F. 888; Quong Sue v. United States, 9 Cir., 116 F. 316; Easton v. Brant, 9 Cir., 19 F. 2d 857; Heath v. Helmick, 9 Cir., 173 F. 2d 157; National Labor Relations Board v. Howell Chevrolet Co., 9 Cir., 204 F. 2d 79, affirmed in Howell Chevrolet Co. v. National Labor Relations Board, 346 U.S. 482; Wigmore on Evidence, Third Edition, § 2034; 32 C.J.S., Evidence, § 1038, pp. 1093-1099.

claiming to be Ly Moon and Ly Sue Ning are in truth and fact Ly Moon and Ly Sue Ning." Thus, in effect, the District Court found that Moon and Ning had not sustained their burden of proof.

However, it appears from the District Court's opinion,[13] that the District Court proceeded on the theory that the burden of proof resting on Moon and Ning was different from and heavier than the ordinary burden of proof resting on plaintiffs in civil actions—a theory which was and is untenable.[14] We hold that Moon and Ning's burden of proof was the ordinary one. As to whether they sustained that burden, we express no opinion.

The judgment is vacated and the causes are remanded with directions to make findings as to whether Ly Shew was the father of Moon and Ning, such findings to be made in the light of this opinion,[15] and thereupon enter such judgment as may be proper.

DENMAN, Chief Judge, dissenting:

I. *The Denial of Due Process and Need for Rehearing En Banc.*

The proceeding before us is the consideration of a petition for rehearing. Instead, the majority opinion and decision treat it as a petition *for reversal* of our then existing decision *without hearing* and *without*

[13]Ly Shew v. Acheson, supra.

[14]Mar Gong v. Brownell, supra; Lee Wing Hong v. Dulles, supra. These decisions, it should be noted, were subsequent to the judgment here appealed from.

[15]Cf. Mar Gong v. Brownell, supra.

reply. The majority's decision is in gross violation of the principles of due process to which Ly Shew is entitled. *It should be reviewed en banc.*

We decided this case with a reversal ordering judgment to be rendered for Ly Shew, requiring the admission of his son and daughter to join their parents and their sister in the United States. Dulles filed a petition for rehearing. Our Rule 23 does not require such a petition to be served on the successful litigant nor for a brief or other opposition to it. All Ly Shew is required to do is to wait to see whether the petition is granted. If granted, Ly Shew for the first time is required to meet the contentions and authorities upon which the rehearing is granted.

The petition consists of several contentions never considered in the opinion in favor of Ly Shew. It relies upon over eighteen federal decisions, never cited in Dulles' brief on appeal.

Upon these contentions and cases the majority opinion reverses our decision in favor of Ly Shew, without granting him any opportunity to reply to them. No clearer case of denial of due process is conceivable.

II. *The Failure to Consider the Facts as in Mar Gong v. Brownell, 209 F. 2d 448, in View of the District Court's Statement that Under the Usual Burden of Proof it is Required to Decide for Ly Shew.*

Assuming, however, that a rehearing en banc is not granted, I further dissent from the opinion's failure

to consider the appeal under the principles established in our decision in Mar Gong v. Brownell, 209 F. 2d 448, where, as here, the opinion directed the lower court to make findings as to paternity "in the light of what is said in this opinion."

In the Mar Gong case we gave an extended review of the evidence and the trial court's disposition thereof, covering nearly five pages of the Federal Reporter. Such a review here is of greater importance since the district court's opinion is based upon a too heavy burden of proof on Ly Shew, the court stating that if the ordinary burden of proof is applied it will be compelled to "issue a rubber stamp decree admitting the plaintiffs" in this case and many other cases. It is only by the wrongful application of the clear and convincing rule, held invalid in the Mar Gong case, that the court found against Ly Shew and his children, that finding being: "II. The persons who claim to be plaintiffs have failed to introduce evidence of *sufficient clarity to satisfy* or *convince* this Court that Ly Shew is the natural blo d father of persons known as Ly Moon and Ly Sue Ning, or that the persons who appeared before this Court claiming to be plaintiffs Ly Moon and Ly Sue Ning are in truth and fact Ly Moon and Ly Sue Ning." (Emphasis supplied.)

The evidence upon which the district court states that applying the ordinary rule of burden of proof it is required to "admit plaintiffs," the boy and the girl, to citizenship to join their citizen sister in the United States amply supports the court's conclusion.

As in the Mar Gong case all of it was given through interpreters. It is as follows:

1. Ly Shew testified that appellants were his children. He said Ly Moon, the boy, was born while he was in China on a visit and that Ly Sue Ning, the girl, was being carried by his wife when he departed. Cancelled checks that he had sent to China for family support were offered but were excluded, I think erroneously, but not affecting the present decision.

2. Ly On testified that he was admitted to the United States as a citizen and as the son of Ly Shew in 1947. He testified that he entered with another brother and his sister, Ly Sue Ngor. He testified that he lived with appellants and otherwise treated them as brother and sister.

3. In court appellants and Ly On simultaneously drew diagrams of the Chinese village where they lived. No conflict here appeared.

4. Ly Moon and Ly Sue Ning both testified they were Ly Shew's children, clearly relevant in connection with the other testimony. Faulkerson v. Holmes, 116 U.S. 389, 397.

5. Leong Yen Way, not a member of the family, was admitted to the United States in 1949. At the time of the trial, he was serving as a soldier in the United States Army. He testified that he visited appellants' family in China in 1948. He testified that he was given a package by them to bring to the father in the United States. He identified appellants as the same persons he had seen in China.

6. Ly Sue Ngor testified that she regarded Ly Shew as her father and Ly Moon and Ly Sue Ning as her brother and sister. She testified that when she left China in 1947, Ly Sue Ning was eleven and Ly Moon fifteen years of age. She said she helped rear the appellants, as an older sister would.

The government's brief does not quarrel with the evidence adduced by appellant, except to the extent that it had attempted to cast doubt on Ly Sue Ngor's credibility by raising doubts as to issues collateral to the issue of her statement of Ly Shew's paternity, a matter not affecting the validity of the others and her testimony. Mar Gong v. Brownell, 209 F. 2d 448, 451.

Upon this evidence and the district judge's statement that he is required to admit the children, we reversed and ordered the district court to enter "a judgment in their favor." This we were required to do as what is "just under the circumstances," 28 U.S.C. § 2106, providing:

> "The Supreme Court or any other court of appellate jurisdiction . . . may remand the cause and direct the entry of such *appropriate judgment,* decree, or order, or require such further proceedings to be had *as may be just under the circumstances.*" (Emphasis supplied.)

Such an order should have been given in the majority's present decision. However, since it is not, further consideration should be given to the erroneous statement of the district court of the factors he states as controlling in consideration of the evidence.

As a suggestion of the likelihood of perjury of these Chinese witnesses[1] the court points out: "A survey of the 716 cases here shows that 95% of the plaintiffs claim to have been born in Kwang Tung Province and 62% in the Toy Shan District of Kwang Tung Province. . . ." It fails to point out that Kwang Tung Province is the only one of the 18 provinces of the great area of China which surrounds the British city, Hong Kong, into which the nearby children of American parents could easily enter, thus freeing themselves from Bolshevik China. None of the other seventeen provinces has such a foreign city on its borders.

Further, the district court stresses, as indicating the likelihood of perjury, the fact that: "An examination of 354 of the 716 complaints shows 367 of the plaintiffs to be males and 39 to be female." It is difficult to see how this is applicable to the instant case where of the two persons for whom declaration of citizenship is sought one is a girl and the record shows that another girl, her sister, had been previously admitted as such a citizen and is now living with her father, Ly Shew.

Undoubtedly there has been much perjury in cases of Chinese seeking to prove their nationality. How-

---

[1]This court has stated in reversing in Lau Hu Yuen v. United States, 85 F. 2d 327, 330, that:

"In certain communities prejudices are said to exist favoring the integrity of testimony of white persons, particularly the so-called 'Nordics', against the red-skinned Indian, the yellow Chinese and Japanese, the dark-complexioned Mediterranean, and darker African. Though its reassertion be trite, I take judicial notice that neither the sense of color nor historical racial antagonisms afford criteria of integrity of the mind."

ever, there is another factor regarding the large number of males their parents seek to bring to the United States, which seems not to have been considered in the reported cases. This is the high status of the son in the centuries' established social relations of the Chinese[2] and the low status there of the female child,[3]—this entirely apart from the much higher earning

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[2]LaTourette, "The Chinese" (1946) 678:
"Closely associated with the family system, and possibly as one of its corollaries, have been the relations between men and women and the position of women. The ceremonies in honor of ancestors have constituted a cornerstone of the Chinese family. *Male progeny has been necessary if these were to be continued.* For this reason boys have been regarded as more valuable than girls. *To the high esteem for men* other factors have contributed. From the economic standpoint boys have been preferable. Remaining in the family as they do, they are producers who throughout their working lives aid its prosperity. On the other hand, after marriage a girl is lost to the family which has been to the expense of rearing her. The centuries-old doctrine of *yin* and *yang* has made for the higher status of men, because the *yang,* associated with good fortune and all that is desirable, has been identified with the male, and the *yin* the element of darkness and evil, is female. . . ." (Emphasis supplied.)

Encyclopaedia Britannica, 14th Ed., Vol. 5, p. 524:
"Religion.—The three great religions of China are Confucianism, Taoism and Buddhism. The special feature of local religion is ancestor worship, though Taoism incorporates much that belongs to primitive religions. In China the dead form an important part of every household. A third son is always a third son, even if his elder brothers are dead. The head of the house, living or dead, is always the head of the house. To his tomb his descendants come, and they have mortgaged much of their scanty acres in erecting grave mounds which must never be ploughed till the family is forgotten. Against such a calamity every precaution is taken by adopting children when sons fail." In the instant case there was no evidence of adoption.

[3]Encyclopaedia Britannica, 14th Ed., Vol. 5, p. 516:
". . . Especially notable is its vigorous unsparing attack on the inferior status of women, child betrothals and costly expenditure on funeral rites. . . ."
LaTourette, "The Chinese" (1946) 674:
". . . In the case of poorer families, daughters may be sold into what is little better than slavery, or even into prostitution."

capacity of the male child. That American fathers of Chinese-born children prefer to leave their daughters in China is no evidence that the testimony concerning the birth of their sons is perjured.

Those who ironically comment on the power of male procreation by American-born Chinamen mating with their wives in China seem ignorant of the above facts.

III. *The Wrongful Invocation of a Religious Doctrine "in Every Sense" Affecting the Decision.*

Finally, as one of its reasons for deciding against Ly Shew's paternity of this boy and this girl, the court states: ". . . In *every sense,* so far as I am concerned, this is God's Country." (Emphasis supplied.)

One wonders whether the omniscient and omnipotent Creator of the Universe, the God of the Christo-Hebraic religion of the majority of American people, has given their country such an exceptional and apparently exclusive position, as distinguished, say, from Great Britain, from which the laws controlling our democracy are derived; or whether China is no longer one of God's countries, where the "golden rule" was stated by Confucius five hundred years before the birth of Christ.

"In every sense" a judge's religious beliefs *should not* consciously affect his attitude towards his witnesses or his interpretation of the law.

The district judge is very able and it is regrettable that the above introduction of religion in this case cannot be treated as a casual irrelevancy, instead of applying "in every sense," that is, not only to the

burden of proof but with its effect on the minds of parties and witnesses—say one shown to be an agnostic or an atheist or a humanist, the latter believing in the brotherhood of man only and not in a god. The Supreme Court's refusal of certiorari on October 14, 1954, made final the decision of the Supreme Court of New Jersey in Tudor v. Board of Education, 100 A. 857, 868. There Chief Justice Vanderbilt's opinion held that the distribution of the King James Bible in the public schools violated the First Amendment made applicable to the States by the Fourteenth. A part of the testimony quoted in the opinion to support the decision is *"and the people who don't accept any religion would feel that the school is actually trying to teach the religion through this means."* (Emphasis supplied.)

Finally, all these cases of the admission of Orientals should be governed by what this court has repeatedly stated in Chinese citizenship cases, that the "right to citizenship is a priceless thing" to the person seeking to establish it. Wong Wing Foo v. McGrath, 196 F. 2d 120, 122, and the statement by the Supreme Court in another Chinese citizenship case, Kwock Jan Fat v. White, 253 U.S. 454, 464, that ". . . It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."

The courts of this circuit should not find themselves subject to the criticism of having such an anti-Oriental attitude as we made in our opinion on General De

Witt's deportation and imprisonment of some 70,000 American citizens of Japanese descent in Acheson v. Murakami, 176 F. 2d 953.

The petition for rehearing should have been denied and our judgment in favor of Ly Shew should have remained undisturbed.

(Endorsed:) Opinion and Dissenting Opinion. Filed Dec. 30, 1954, as amended by Orders of Jan. 3, 1955 and Jan. 5, 1955.

Paul P. O'Brien, Clerk.

Appendix "F"

Relating to Certificates of Identity

Section 50.19 (1949 edition), relating to the application for a Certificate of Identity states, inter alia, that the application shall show:

> (3) That he claims to be a national of the United States, and the basis of such claim and evidence submitted in support thereof;
>
> (4) That such claim is made in good faith and upon a substantial basis;
>
> (5) That he claims a right or privilege as a national of the United States, and specifically the nature of such claim;
>
> (6) That such right or privilege has been denied him by a specific department or agency or executive official of the United States on the ground that the applicant is not a national of the United States, and the date and place of such denial;
>
> (7) That an action for a judgment declaring applicant to be a national of the United States has been instituted by him * * *;

Section 50.20 provides:

> "Independent Investigation
>
> When an application for a certificate of identity is executed before a diplomatic or consular officer, an independent investigation of the facts in the case should be made, as far as practicable, by such officer, even though the application and proofs submitted therewith may on their face appear to justify issuance of a certificate of identity."

Section 50.21 which relates to "Good faith and substantial basis of claim of United States nationality" further limits the issuance of such documentation. Subparagraph (c) thereof reads as follows:

> "Meaning of Substantial basis. A substantial basis of a claim of United States nationality means one which satisfies the diplomatic or consular officer of the United States that the claim of the applicant that he is a national of the United States is, notwithstanding any previous ruling of a department, agency or executive official of the United States, sufficiently meritorious to justify resort to the court for a determination of the question."

8 C.F.R. 112.2 (1947 Edition) provides:

> "The holder of such a certificate of identity *shall be regarded as an alien unless otherwise finally held by the court* in the action for a judgment declaring him to be a national of the United States. He *shall be admitted to the United States as a temporary visitor* for business *on the condition,* including when deemed necessary, the giving of a bond with sufficient surety, *that he shall depart from the United States* if it is discovered that he has obtained admission by fraud or other illegality or *if the final action in court to determine his nationality is not to the effect that he is a national of the United States.* * * *" (Italics added).

The face of a Certificate of Identity contains the following:

AMERICAN CONSULATE GENERAL

At .....

Date.....

CERTIFICATE OF IDENTITY ISSUED UNDER SECTION 503 OF THE NATIONALITY ACT OF 1940

This is to certify that.....

.....

whose signature and photograph are affixed to his application, made a part hereof, has presented evidence satisfying the undersigned that he has an action under section 503 of the Nationality Act of 1940 pending in a court in the United States for a judgment declaring him to be a national of the United States. This certificate is issued to him to permit admission to the United States under regulations prescribed in part 112 of chapter I, title 8, Code of Federal Regulations, and upon the condition that he shall be subject to deportation if the final outcome of such action is not to the effect that he is a national of the United States and if he then fails to depart therefrom without delay in accordance with directions from the Immigration and Naturalization Service.

.....

(Signature)

(Consul) of the

.(SEAL) United States of America.

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344117—55

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 663

WILLIAM Y. FONG, AS GUARDIAN AD LITEM FOR FONG WONE JING, FONG HUNG WING AND FONG NGAR JING, PETITIONERS

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENT

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–4), which was in substitution for an earlier opinion filed in the same case (Pet. App. 5–8), is reported at 217 F. 2d 138.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1954 (R. 123). A timely petition for rehearing was denied on January 25, 1955 (R. 124). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the court of appeals erred when it affirmed the judgment of the district court on the ground that petitioners had failed to allege and prove that any of them had claimed a right as a national of the United States and had been denied such right upon the ground that he or she was not a national of the United States, it appearing that the failure in proof found to exist was due in part to the unavailability at the time of the trial of the State Department file in petitioners' case, and that all parties assumed at the trial that petitioners had been denied documents to travel to the United States upon the ground that they were not nationals.

STATUTE INVOLVED

Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171, 8 U. S. C. (1946 ed.) 903, provided, in part, as follows:

> If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person

claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. * * *[1]

STATEMENT

Pursuant to Section 503 of the Nationality Act of 1940 (8 U. S. C. (1946 ed.) 903) (*supra*), petitioners (two girls and a boy), through their guardian ad litem, instituted an action in the United States District Court for the Northern District of California against the Secretary of State seeking a declaration of United States na-

[1] This statute has been repealed by the Immigration and Nationality Act of 1952, 66 Stat. 163 (8 U. S. C. 1101, *et seq.*) which became effective December 24, 1952, but Section 405 (a) of the latter Act continues the former statute in force and effect as to suits which were pending when the new Act became effective. (66 Stat. 280).

tionality (R. 3–11). The complaint alleged that each of the petitioners was the Chinese-born child of an American citizen, Fong Lim Fong, who had married in China and had died there during World War II (R. 3–5). The complaint further alleged that applications were filed with the American consulate at Hong Kong for the issuance of United States passports or travel documents in behalf of petitioners, and that, on or about January 24, 1952, each of them was informed that "their applications for documentation had been denied, and that 'the Consulate General declines to afford you facilities for the execution of an affidavit for the purpose of travelling to the United States' " (R. 5–6). The complaint further alleged that the refusal to permit petitioners to proceed to a port of entry for the purpose of having their admissibility determined by the agency charged with such duty "is an arbitrary and unreasonable refusal or denial of a right or privilege of a United States national" (R. 6). It also alleged that plaintiffs' applications for documentation as United States citizens were denied and that the Department of State "through its official executive at Hong Kong did, on or about January 24, 1952, deny the plaintiffs * * * a right or privilege as nationals of the United States" (R. 6).

The answer of the Secretary of State (R. 8–11) denied that petitioners were the lawful blood children of the claimed father (R. 8), and affirma-

tively asserted that petitioners "do not have any right or privilege as nationals of the United States" (R. 9). As to the allegations with respect to the refusal of documentation at Hong Kong, the answer stated that the defendant "has no knowledge, information or belief" with respect thereto "and therefore denies the same" (R. 9).

At the trial,[2] government counsel stated to the court that the entire State Department file on petitioners had been lost, and that, despite an intensive search, the file had not been found, that the government had no witnesses, and that "we do not know why the Consul denied them in the first place" (R. 20).

Petitioners offered the following evidence:

Each of the plaintiffs testified that they were the children of Fong Lim Fong (who was shown to have been admitted to the United States as an American citizen (R. 25)) and his wife, Yee Shee, and had been born in Gong Mee Village. All said they had lived together with their mother and an elder brother who came to the United States in 1949. (R. 59–60, 66–68, 71–73.)

Fong Wone Jing testified that she was born on January 7, 1934 (R. 59). It was stipulated that the records showed that Fong Lim Fong, the alleged American-citizen father, had returned to

[2] Petitioners had been allowed to proceed to the United States under certificates of identity (R. 19).

San Francisco on January 17, 1933, and had departed from there on January 16, 1934 (R. 28). The alleged grandmother, who was 71 at the time of the trial (R. 27), testified that in 1935 she had visited her son and his wife in China, that they had a son and daughter at that time, and that, when the grandmother left early in 1936, the girl could walk (R. 29, 36). An aunt, who accompanied the grandmother to China, testified that the girl was not quite two at the time of their visit to China (R. 74–76).

Fong Hung Wing testified that he was born on January 30, 1936 (R. 66). The alleged grandmother testified that while she visited her son Fong Lim Fong in China, a son was born to her daughter-in-law, named Fong Ngar Jing (R. 30) (actually the name of the youngest plaintiff, a girl). Later, she identified a photograph as taken in China shortly before she left and said that it showed Fong Hung Wing (the baby) in her arms (R. 34). The aunt, who accompanied the grandmother to China, also testified that a son was born to Yee Shee during the visit (R. 77–78).

Fong Ngar Jing testified that she was born November 7, 1937 (R. 71). The grandmother testified that, after she returned to the United States, her son Fong Lim Fong wrote that he had had another daughter, Fong Ngar Jing (R. 35).

Fong Din Deck, also known as Fong Hung Fong, who had been admitted to the United

States in 1949, testified that he was the eldest child of Fong Lim Fong and that the three plaintiffs were his brother and sisters, that they had all lived with their mother (and until 1938 with their father) (R. 50–58). A photograph, which he testified had been taken in 1949 (R. 58), was identified by all the witnesses as being that of Yee Shee, the mother, and the four children (Ex. 3, R. 27–28, 58, 63, 64, 69, 72–73, 78).

At the conclusion of the evidence, the trial judge stated that he would take the case under advisement (R. 101). He commented informally that he believed the San Francisco members of the family were "themselves acting in good faith" (R. 101). In formal findings, he found that plaintiffs did not have permanent residence and domicile in the United States or the Northern District of California (R. 13) and that they "failed to introduce evidence of sufficient clarity" to satisfy the court that Fong Lim Fong was their father or that they were in truth and in fact the persons they claimed to be (R. 13–14). Accordingly, he denied the relief sought (R. 14–15).

In another case of the same general character decided the same day, *Ly Shew* v. *Acheson,* 110 F. Supp. 50 (N. D. Cal.) (Pet. App. 9–30), the same district judge held that in such cases the burden of proof was on the plaintiffs to establish their citizenship by "clear and convincing" evidence (Pet. App. 26). That ruling was re-

versed on appeal to the Court of Appeals for the Ninth Circuit (*Ly Shew* v. *Dulles*, 219 F. 2d 413 (Pet. App. 31–56)), the court of appeals holding that the burden of proof was the ordinary one resting on the plaintiff in a civil action (Pet. App. 47). After first directing entry of judgment in favor of the plaintiffs in the *Ly Shew* case (Pet. App. 41), the appellate court amended its opinion to order reconsideration by the district court in the light of its opinion setting forth the proper standard of proof (Pet. App. 47).

In the instant case, the court of appeals, on the same day that it handed down its first opinion in the *Ly Shew* case, affirmed the judgment of the district court (Pet. App. 5–8). It found at that time that Section 503 gave petitioners a right of action (Pet. App. 7), that counsel for the Government had admitted that the claimed applications had been denied (Pet. App. 7), and that the denial constituted a denial of a privilege as a national (Pet. App. 7–8). It also found that petitioners had failed to prove their claim (Pet. App. 8). Subsequently, the court withdrew this opinion and substituted a new opinion (Pet. App. 1–4) in which it affirmed the judgment of the district court on the ground that petitioners had failed to allege or prove that any of them had claimed a right or privilege as a national of the United States and had been denied such right or privilege by an agency of the United States "upon the ground that he or she

was not a national of the United States" (Pet. App. 4).

DISCUSSION

1. The Court of Appeals for the Ninth Circuit has held that an action under former Section 503 of the Nationality Act of 1940 lies at the instance of one who claims citizenship as the foreign-born child of an American-citizen parent and who has been denied a right or privilege as a national of the United States on the ground that he is not such a child and therefore not such a national. *Fong Nai Sun* v. *Dulles,* 219 F. 2d 269. It has also ruled that the denial of a passport is a denial of a right or privilege as a national, a ruling which is in accord with that of the Court of Appeals for the Seventh Circuit in *Lee Wing Hong* v. *Dulles,* 214 F. 2d 753. It has further held that the burden of proof to establish United States nationality under such circumstances is the ordinary one, and not that of clear and convincing evidence. *Ly Shew* v. *Dulles,* 219 F. 2d 413 (C. A. 9) (Pet. App. 42–56). None of these issues is here involved.

The decision in the instant case turns on the narrow ground that the complaint did not allege and the evidence did not show that the denial of a right or privilege as a national was "upon the ground that [such person] is not a national of the United States," as required by Section 503. See also *Dulles* v. *Lee Gnan Lung,* 212 F. 2d 73 (C. A.

9).[3] This is not a mere technicality. Actions under Section 503 have been filed where the plaintiff's application for travel documents had not in fact been denied on the ground that such person was not a national, as, for example, where there had been merely a request by the American Consul for additional information or a failure to act pending investigation. In such circumstances, no right of action under Section 503 has accrued. See *Ling Share Yee* v. *Acheson*, 214 F. 2d 4 (C. A. 3), certiorari denied, 348 U. S. 873. The decision below is thus correct in holding that it is incumbent on the plaintiff in a Section 503 action to plead and prove that he has claimed and been denied a right as a national on the ground that he is not a national.

In the instant case, however, the case was allowed to go to trial even though there was no express allegation that the denial of travel documents was on the ground that the infant petitioners were not nationals. Had the proof shown the reason for the denial, the formal defect in pleadings would probably have been regarded as cured by the proof. Cf. F. R. Civ. P., Rule 8 (f). While such proof was not offered at the trial, even though petitioners were before the court and

[3] In a recent opinion in another case, *Fong Nai Sun* v. *Dulles*, 219 F. 2d 269 (C. A. 9), a different panel of the court of appeals explained (at p. 271) that the point decided in the instant decision "was that the allegations of the complaint were insufficient to invoke the application of [Section 503]."

presumably could have testified to the facts, the United States Attorney did state at the outset of the trial that, despite diligent search, petitioners' State Department file, which would have shown the reason for the denial, had been lost, and all parties seem to have conducted the trial on the assumption that the denial had been upon the ground that petitioners were not nationals. Petitioners' State Department file, we are informed, has since been found. Had it been introduced in evidence, it would have shown that petitioners had been denied travel documents upon the ground that their claim was fraudulent. Since the absence of the file, for which petitioners were not responsible, may have contributed to the deficiencies in petitioners' proof which the court of appeals regarded as fatal to their claim, we suggest that it would be a proper disposition of this case to grant the petition for certiorari and remand the case to the district court for further proceedings and appropriate findings.

2. This disposition of the case seems appropriate for the additional reason that the finding of the district court that petitioners had not sustained the burden of proof was predicated (see R. 11) upon the standard of proof announced by that court in *Ly Shew* v. *Acheson,* 110 F. Supp. 50 (Pet. App. 9–30), reversed, *Ly Shew* v. *Dulles,* 219 F. 2d 413 (C. A. 9) (Pet. App. 42–56). The district court proceeded on the theory that the burden of proof resting on the plaintiffs was

different from and heavier than the ordinary burden of proof resting on plaintiffs in civil actions. The suggestion that such a higher standard of proof obtained in suits under Section 503 has since been rejected by the Court of Appeals for the Ninth Circuit. *Ly Shew* v. *Dulles, supra.*

CONCLUSION

For the reasons stated in this memorandum, we conclude that the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the district court (a) for determination of the grounds for the denial of petitioners' applications for travel documents and (b) if it is found that such documents were denied on the ground that petitioners were not nationals, for determination (applying the governing standard of proof) whether petitioners have established that they are nationals of the United States.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

MAY 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1955

Decisions Per Curiam.

No. 663. FONG, GUARDIAN AD LITEM, ET AL. *v.* DULLES, SECRETARY OF STATE. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the District Court for a new trial in accordance with the Govern-

ment's suggestion. *Joseph S. Hertogs* for petitioners. *Solicitor General Sobeloff* for respondent. Reported below: 217 F. 2d 138.